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No. 91-1300

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

SHARON DUNNIGAN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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1. Respondent argues that the district court "made no independent findings of fact and obviously placed great weight on the jury verdict in determining [respondent] had testified falsely at trial." Resp. Br. 6. That characterization of the district court's finding is inaccurate. The district court expressly found that respondent lied when she testified at trial. The court stated, J.A. 29:

> The court finds that the defendant was untruthful at trial with respect to material matters in

> this case. The defendant denied her involvement when it is clear from the evidence in the case as the jury found beyond a reasonable doubt that she was involved in the conspiracy alleged in the indictment, and by virtue of her failure to give truthful testimony on material matters that were designed to substantially affect the outcome of the case, the court concludes that the false testimony at trial warrants an upward adjustment by two levels.

Respondent argues that the court based its finding of perjury on the fact that she was convicted, but that is not what the district court did, as the court's remarks make clear. Although the court noted that the jury had found beyond a reasonable doubt that respondent was involved in the conspiracy charged in the indictment, that reference did not suggest that the court was relying on the jury's verdict to enhance respondent's sentence under Sentencing Guidelines § 3C1.1. Rather, the court was simply making the point that the jury agreed with the court's conclusion that respondent was involved in the conspiracy and that her testimony to the contrary was false. The district court's ruling therefore cannot be criticized on the ground that the court did not make an independent finding that respondent committed perjury when she testified at trial.

2. Respondent also argues, Resp. Br. 13-14, that the obstruction of justice enhancement in Sentencing Guidelines § 3C1.1, if applied to perjured testimony at trial, will be imposed on every testifying defendant who is convicted and thus will become an improper "wooden or reflexive" enhancement. That argument ignores the fact that a court must make an independent determination whether the defendant committed

perjury, and that there are circumstances in which a defendant may testify truthfully, but nonetheless properly be convicted by a jury or a court.

To begin with, a district court must uphold a conviction if a reasonable jury could have found the evidence sufficient, regardless of the court's own view of the evidence and the credibility of the witnesses. See *Jackson* v. *Virginia*, 443 U.S. 307, 318-319 (1979); *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). Therefore, a jury may convict a defendant, and the district court may properly uphold the conviction, even though the district court believed the defendant's testimony and would have acquitted the defendant if the case had been tried to the court. In that situation, the court would not impose the two-level obstruction of justice enhancement for false testimony at trial.

Similarly, there are situations in which a testifying defendant may be convicted even though the trier of fact does not believe that the defendant testified falsely. For example, a defendant may testify in support of a defense of entrapment or duress; the jury may believe his testimony but nonetheless reject his defense as factually insufficient. Or, a defendant may testify about the circumstances of the crime, hoping to persuade the jury that he was not sufficiently involved in the offense to be culpable. The jury may conclude that the defendant has testified truthfully, but be unpersuaded that he is legally innocent. Thus, the two-point enhancement for obstruction of justice would not automatically be imposed on any testifying defendant convicted at trial.

In any event, there is no constitutional flaw in a sentencing scheme that predictably enhances a defendant's sentence if he is found to have perjured himself at trial. While respondent chooses the pejora-

tive terms "wooden and reflexive," we believe that the terms "consistent and predictable" more accurately describe the operation of the obstruction of justice enhancement in Guidelines § 3C1.1, as applied to perjured testimony at trial. Perjury is a crime, and while a defendant is constitutionally entitled to testify in his own behalf, the Constitution provides no protection for perjury. The Sentencing Guidelines seek to construct a rational framework for sentencing, in which factors such as the commission of other crimes have a consistent and predictable effect on the defendant's sentence. There is no reason to treat the commission of the crime of perjury at trial in a fundamentally different way from the commission of a crime while the defendant is awaiting trial on the charges against him.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

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